ATTORNEY FOR APPELLANT:

HILARY BOWE RICKS
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEPHEN R. CARTER
Attorney General of Indiana
Indianapolis, Indiana

ELLEN H. MEILAENDER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ANDRE WILLIAMS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0512-PC-1191
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable William Young, Judge
Cause No. 49G20-0104-PC-080326

SEPTEMBER 27, 2006

MEMORANDUM DECISION ON REHEARING – NOT FOR PUBLICATION

ROBERTSON, Senior Judge

STATEMENT OF THE CASE

Petitioner-Appellant Andre Williams was convicted by a jury of the Class A felony of dealing in cocaine, the Class C felony of possession of cocaine, and the Class A misdemeanor of possession of marijuana. His direct appeal raised the sole issue related to the State's alleged use of racially discriminatory preemptory challenges. His conviction was affirmed, and Williams appealed from the denial of his petition for post-conviction relief.

On August 9, 2006, we issued a memorandum decision in which we held that the issues raised on appeal were waived. Williams responded by filing a petition for rehearing. We grant the petition for rehearing and address the issues individually below. In granting rehearing, we render the August 9, 2006 memorandum decision a nullity.

We affirm.

ISSUE

Williams states the issue as: whether Williams received ineffective assistance of trial counsel, in violation of the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article One, Sections Twelve and Thirteen of the Indiana Constitution.

FACTS

Williams, Pittman and Rosalyn Huggins planned to spend the day together. They bought some beer and went to Pittman's home where they were eventually were joined by Karen Huggins, but Huggins left after a while. The police executed a search warrant

at the address. They found Williams in a bedroom where the windows were covered and the room was lit only by a candle. Williams had marijuana in his pocket and was leaning over a table that had scales and cocaine on it. There was also packaged cocaine on the floor, which was within Williams' reach. Williams' defense was that he was there to smoke marijuana and that he had nothing to do with the cocaine.

Additional facts will be added as needed.

DISCUSSION AND DECISION

Standard of Review

Post-conviction proceedings are not "super appeals" through which convicted persons can raise issues they failed to raise at trial or on direct appeal. *Bahm v. State*, 789 N.E.2d 50, 57 (Ind. Ct. App. 2003), *trans. denied*. Rather, post-conviction proceedings afford petitioners a limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal. *Id.* Post-conviction proceedings are civil in nature, and petitioners bear the burden of proving their grounds for relief by a preponderance of the evidence. *Id.* When a petitioner appeals the denial of post-conviction relief, he appeals from a negative judgment. *Id.* Consequently, we may not reverse the post-conviction court's judgment unless the petitioner demonstrates that the evidence "as a whole" leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. *Id.* On appeal, we may not reweigh the evidence or reassess the credibility of the witnesses. *Id.*

Ineffective Assistance of Counsel

A Sixth Amendment claim of ineffective assistance of counsel, if not raised on direct appeal, may be presented in post-conviction proceedings. *Id.* at 58; *Woods v. State*, 701 N.E.2d 1208, 1220 (Ind. 1998), *cert. denied,* 528 U.S. 861, 120 S.Ct. 150, 145 L.Ed.2d 128 (1999).

We review ineffective assistance of trial and appellate counsel claims under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984). *Bahm, id.* First, the petitioner must demonstrate that counsel's performance was deficient because it fell below an objective standard of reasonableness and denied the petitioner the right to counsel guaranteed by the Sixth Amendment to the United States Constitution. *Id.* at 57-8. Second, the petitioner must demonstrate that he was prejudiced by his counsel's deficient performance. *Id.* To demonstrate prejudice, a petitioner must demonstrate a reasonable probability that the result of his trial or appeal would have been different if his counsel had not made the errors. *Id.* A probability is reasonable if our confidence in the outcome has been undermined. *Id.*

We presume that counsel provided adequate assistance, and we give deference to counsel's choice of strategy and tactics. *Id.* Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. *Id.* We will not speculate as to what may or may not have been advantageous trial strategy as counsel should be given deference in choosing a trial strategy which, at the time and under the circumstances, seems best. *Slusher v. State*, 823 N.E.2d 1219, 1221 (Ind. Ct. App. 2005).

Claimed Errors

Williams alleges that the following errors occurred at trial:

1. Counsel was ineffective for allowing the prosecution to impeach the defendant with his prior silence or to call attention to the defendant's earlier silence.

2. Counsel was ineffective for not seeking a mistrial during jury selection.
3. Counsel was ineffective for eliciting evidence that no drug paraphernalia was found in the house and that the cocaine was packaged for sale.

4. Counsel was ineffective for failing to file a motion to suppress a search warrant.

5. Counsel was ineffective for failing to subpoena witnesses.

6. Counsel was ineffective for not submitting a circumstantial evidence instruction.

7. That the cumulative effect of the foregoing allegations of error require a reversal.

Doyle Violation

Williams first argues that a *Doyle* violation[1] occurred when the State was allowed to impeach Williams with his prior silence and was permitted during closing argument to call the jury's attention to Williams's earlier silence. A *Doyle* violation occurs when the prosecution is allowed to impeach a defendant with his prior silence or is permitted to call attention to the defendant's earlier silence. *Oritz v. State*, 716 N.E.2d 345, 349 (Ind. 1999).

The trial court's findings of fact on this question relates that Williams appeared as a witness and his trial counsel did not object to his being asked why he did not advise the police that he was there just to smoke marijuana. The reasons why no objection was made are that trial counsel knew that Williams had been advised of his rights at the scene,

[1] *See Doyle v. Ohio*, 426 U.S. 610, 618, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976))

that Williams had prior arrests which would have advised him of his rights, and, most importantly, Williams said that he had not been asked, which reflected poorly on police professionalism. The trial court's conclusion of law relates, among other things, that because Williams trial counsel testified that the evidence and comment in question was in fact allowed by the defense as it was deemed that [Williams] response that "Nobody asked me" would fit the strategy of trying to attack the professionalism of the investigation. The trial court added that it would not grant relief based upon a viable defense tactic that simply failed.

Statements obtained in violation of the federal constitution and erroneously admitted are subject to harmless error analysis. *Storey v. State*, 830 N.E.2d 1011, 1021 (Ind. Ct. App. 2005). A federal constitutional error is reviewed *de novo* and must be harmless beyond a reasonable doubt. *Id.* The State bears the burden of demonstrating that the improper admission of a defendant's statement did not contribute to the conviction. *Id.* To say that an error did not contribute to the verdict is to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record. *Id.* If the State has presented other overwhelming evidence of the defendant's guilt, then an erroneously admitted statement may be deemed harmless.

The State contends, and we agree, that overwhelming evidence of guilt was presented. The jury heard evidence that Williams was found in a room with the door shut and the windows covered; he was sitting on a couch and on the coffee table directly in front of him was a digital scale, a razor blade with cocaine residue on it, plastic baggies and a plate with several chunks of cocaine, totaling over five grams and in the process of

being cut into smaller pieces; and, within arm's reach and on the floor, there was a pile of individually packaged rocks of cocaine totaling over ten grams.

We find no error on this issue.

Mistrial

One prospective juror expressed her sentiments that all defendants lied and were guilty. The prospective juror was excused and the trial court asked the remaining jurors if the remarks had affected their ability to be fair and unbiased. They said that the remarks did not influence them. Williams now contends ineffective counsel because there was no motion asking for a mistrial.

Williams's trial counsel testified at the post-conviction hearing that he discussed a mistrial with Williams; however, it was decided to proceed with the trial because of the absence of a State's witness Pittman, whose testimony would not have been beneficial to Williams. We are of the opinion that to wait, or not to wait, for a later trial date, and the possible appearance of a non-beneficial witness, is strictly a tactical decision that does not support an ineffective counsel claim. *See*, *Bahm*, *id.* at 58.

Paraphernalia

Williams next complains that his counsel was ineffective for eliciting testimony that no drug paraphernalia was found in the house and that the cocaine was packaged for sale. Williams' trial attorney said he solicited that information from a police officer because his defense theory was that Huggins smoked cocaine, and it was consistent that when they left the house they took their paraphernalia with them.

Williams cites to *McBride v. State*, 595 N.E.2d 260 (Ind. Ct. App. 1992), *trans. denied,* for the proposition that such a tactic is not objectively reasonable. We give deference to counsel's choice of strategy and tactics. *Specht v. State,* 838 N.E.2d 1081, 1087 (Ind. Ct. App. 2005), *trans. denied*. We presume competence on the part of a lawyer; an action or omission that is within the range of reasonable attorney behavior can only support a claim of ineffective assistance if that presumption is overcome by specific evidence as to the performance of the particular lawyer. *Id.*

Our reading of the post-conviction hearing transcript reveals no evidence, especially from Williams, relating to this issue. Williams has not sustained his burden of proof, which along with the fact that Williams's trial attorney pursued the defense strategy that Williams did not use cocaine while at Pittman's house, negates any substance to this issue.

Search Warrant

Williams next argues that ineffective assistance of counsel occurred when his trial attorney did not file a motion to suppress the search warrant for the reason there was insufficient information to tie Williams to the search. During the post-conviction hearing, Williams trial attorney expressed his opinion that the warrant was sufficient.

To prevail on an ineffective assistance of counsel claim based upon counsel's failure to file motions on the defendant's behalf, the defendant must demonstrate that such motions would have been successful. *Wales v. State*, 768 N.E.2d 513, 523 (Ind. Ct. App. 2002), *on reh'g*, 774 N.E.2d 116, *trans. denied*, 783 N.E.2d 703. We agree with the State's argument that Williams did not have standing to challenge a search warrant

directed to the property of another, Pittman's residence in this case. Williams did not present evidence that he had ownership, control, or possession of the house and as a result he does not have standing to challenge the search of the house or the seizure of contraband under the Indiana Constitution. *See Person v. State*, 764 N.E. 2d 743, 749 (Ind. Ct. App. 2002), *trans. denied.*

Failure to Subpoena Witnesses.

Williams claims ineffective assistance of trial counsel because of the failure to subpoena Roselyn Higgins and Mark Pittman. Higgins gave an unsworn statement to trial counsel's investigator. Williams trial counsel was of the opinion that in both instances the witnesses would not be beneficial to Williams.

A decision regarding what witnesses to call is a matter of trial strategy which an appellate court will not second guess. *Johnson v. State*, 832 N.E.2d 985, 1003 (Ind. Ct. App. 2005). Which witnesses to call is the epitome of a strategic decision. *Wrinkles v. State*, 749 N.E.2d 1179, 1200 (Ind. 2001), *cert. denied*, 535 U.S. 1019, 122 S.Ct. 1610, 152 L.Ed.2d 624 (2002). We find no error on this issue.

Circumstantial Evidence Instruction

Williams claims ineffective assistance of trial counsel because of the failure to submit a final instruction based upon circumstantial evidence. When a case rests entirely on circumstantial evidence, a defendant is entitled to such an instruction. *Lloyd v. State*, 669 N.E. 2d 980, 985 (Ind. 1996). However, we do not agree that this case is based wholly on circumstantial evidence. In cases based solely on circumstantial evidence, there are generally no witnesses to the alleged crime. *Id.* The police saw Williams in a

partial standing position from getting up from the couch and leaning over the table and floor where the cocaine was located. A police witness testified to that fact making a case for constructive possession and eliminating the need for a circumstantial evidence instruction.

Cumulative Effect

Having found no error, we find that there is no cumulative effect requiring reversal.

CONCLUSION

Williams has failed to demonstrate ineffective assistance of counsel. The judgment of the post-conviction court in denying the petition for post-conviction relief is affirmed.

ROBB, J., and VAIDIK, J., concur.